

WAIVERS OF SUBROGATION

Professional engineers should remember that many standard contracts contain waiver of subrogation clauses. Owners, professional engineers, contractors and subcontractors often pay little attention to such clauses when standard AIA or EJCDC contracts are entered into. Often, they ignore the waiver provisions and do not discuss them with their insurance carriers. However, when a construction site is damaged through fire or explosion, or other calamity, it is not unusual for subrogation issues to arise after insurance carriers pay insureds (whether the insureds be owners, professional engineers, contractors or subcontractors) and wish to pursue subrogation claims against principal wrongdoers.

Such waiver of subrogation clauses have long been found in AIA and EJCDC documents and continue to appear in the latest editions. For example, AIA Document A201, 2007 edition, contains a waiver of subrogation provision in paragraph 11.3.7. EJCDC Document C-700, 2007 edition, contains a waiver of subrogation provision in paragraph 5.07. Both of these standard “General Conditions” apply to contracts between owner and contractor, owner and professional designer, contractor and subcontractor, and professional designer and subconsultant. While parties often strike or change standard provisions, these waiver of subrogation provisions often go unnoticed.

In a case decided by the Court of Appeals in February, 2008, Wisconsin State Local Government Property Insurance Fund v. Thomas A. Mason Company, the Court of Appeals held that the state agency created to provide property insurance for local governments had waived its right to subrogation recovery from a subcontractor. The owner of the project, Milwaukee County, hired J.F. Cook Company to renovate the County’s Villa Terrace Museum. The contract adopted an edition of the AIA A201 form, “General Conditions of the Contract for Construction.” Cook hired Mason as a subcontractor to do painting work and the subcontract

was also an edition of AIA “Standard Form of Agreement Between Contractor and Subcontractor.” Each of these standard AIA contracts contained a waiver of subrogation provision. Under its agreement with Cook, the County was required to get a builder’s all-risk policy and the County obtained its insurance from the state agency created to provide property insurance to local governments, the Wisconsin State Local Government Property Insurance Fund. The Fund paid Milwaukee County for the fire loss and asserted a subrogation claim against the subcontractor and its insurer for the fire damage caused by the subcontractor employee. The circuit court dismissed the subrogation claim and on appeal the Fund contended that the circuit court had erred in determining that the Fund’s subrogation claims against the subcontractor were effectively waived by the Fund’s insured, Milwaukee County, and that the County’s waiver was co-extensive with the insured loss.

The subcontract between Cook and Mason required Mason to get insurance in connection with the project and had a waiver of rights and waiver of subrogation clause almost identical to the one in the contract between the County and Cook. The Fund’s insurance contract with the County specifically recognized the County’s right to waive the Fund’s subrogation right for any loss it paid. The Fund contended, however, that under the statutes the Fund had a right to recover by subrogation and could not lose such a right because its insured waived any right of recovery it would otherwise have, citing § 605.24(3) of the Wisconsin Statutes.

The Court of Appeals recognized that under ordinary subrogation principles, an insurer is subrogated to the rights of its insured against third parties when the insurer pays its insured for damages inflicted on the insured by third parties. However, the Court observed that there is nothing in the statutes that would prohibit the Fund from voluntarily contracting away its right to pursue third parties for recovery of its insurance benefits paid to its insured. The Court

concluded that the Fund must have been aware of the statutes and presumably set its premiums charged to the County based on the risk that it was assuming, including the clause in the standard construction contracts granting the authority to extinguish the Fund's subrogation rights. The Court found no reason why the Fund could not make the informed decision to waive its rights of subrogation.

Whether using standard agreements of AIA or EJCDC, or in-house or third-party contracts, professional engineers should continually review the insurance provisions with their insurance carriers. The absence of a waiver of subrogation clause could subject a professional engineering firm to damages which otherwise could have been avoided when the complex issues surrounding a significant property loss on a construction site occurs. If waiver of subrogation clauses are found in construction contracts between contractor and subcontractor, but not in the design contract between owner and professional designer, it substantially increases the exposure of the professional designer to a subrogation claim, even when there is adequate insurance to cover the entire loss. Insurers are expected to pursue subrogation claims when their rights to do so have not been limited or extinguished by contract.